

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 8, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP1256-CR**

**Cir. Ct. No. 2002CF1477**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**ANTHONY ELLIS,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
DENNIS P. MORONEY, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Anthony Ellis, *pro se*, appeals an order denying his motion to modify his sentence. The issue is whether there is a “new factor” that would allow Ellis to bring this motion despite the passage of time since his

conviction and the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We affirm.

¶2 Ellis was convicted of one count of attempted armed robbery and one count of armed robbery, both with threat of force, on July 10, 2002. The circuit court sentenced him to two concurrent terms of twenty-five years of imprisonment, with fifteen years of initial confinement and ten years of extended supervision. We affirmed the judgment of conviction after a no-merit appeal. Since that time, Ellis has repeatedly sought relief in the circuit court, in this court and in the supreme court, including motions for sentence modification, motions for postconviction relief pursuant to WIS. STAT. § 974.06, and *Knight*<sup>1</sup> petitions. In the action from which this appeal is taken, Ellis moved the circuit court to modify his sentence, arguing that the circuit court made an error when reviewing the sentencing guidelines, thereby placing him in a higher recommended sentencing range. The circuit court rejected Ellis’s argument, concluding that his claim was barred by *Escalona-Naranjo*, 185 Wis. 2d at 185, 517 N.W.2d at 163–164.

¶3 To avoid the procedural bar his claim would otherwise face under *Escalona-Naranjo*, Ellis contends that the circuit court’s alleged error with the sentencing guidelines is a “new factor.” A “new factor” is ““a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.”” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 74, 797

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<sup>1</sup> See *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

N.W.2d 828, 838 (citation omitted). A motion for sentence modification premised on a new factor may be brought at any time without regard to appellate time limits or other procedural bars.

¶4 Ellis contends the circuit court’s alleged error is a new factor because the circuit court unknowingly overlooked the correct information, even though it was then in existence, when it decided where his case fell in the sentencing guidelines. Assuming for the sake of argument that the circuit court made an error in considering the sentencing guidelines, and therefore believed Ellis fell into a suggested sentencing range that was more harsh than it would have been without the error, the information is not a new factor because it was not highly relevant to the sentence the circuit court imposed; in fact, the circuit court did not mention the sentencing guidelines at all during its sentencing remarks, much less place great weight on them. Therefore, the circuit court’s alleged error using the sentencing guidelines is not a “new factor” that allows Ellis to escape the procedural bar of *Escalona-Naranjo*, 185 Wis. 2d at 185, 517 N.W.2d at 163–164.

¶5 Moreover, Ellis would not be entitled to resentencing because the law in effect when Ellis was sentenced precluded him from raising an appellate challenge based on the sentencing guidelines. At the time Ellis was sentenced, WIS. STAT. § 973.012 (1987–1988) provided: “There shall be no right to appeal on the basis of the trial court’s decision to render a sentence that does not fall within the sentencing guidelines.” Based on this statute, we refused to consider appellate claims based on the circuit court failure to follow the guidelines or explain its reasons for deviating from the guidelines. *See State v. Halbert*, 147 Wis. 2d 123, 132, 432 N.W.2d 633, 637 (Ct. App. 1988) (overruled in part by

*State v. Speer*, 176 Wis. 2d 1101, 1122–1123, 501 N.W.2d 429, 436 (1993)).<sup>2</sup> Ellis cannot raise a collateral challenge to his sentence based on the sentencing guidelines that he would have been barred from raising at the time his sentence was imposed.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

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<sup>2</sup> The State argues that Ellis’s arguments must fail for multiple reasons. We address only two of the alternative rationales in our decision because they dispose of the appeal, although we agree with the State that Ellis’s appeal is meritless for the other reasons suggested by the State. See *Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 631 n.1, 673 N.W.2d 716, 718 n.1.

